United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original w D Affidavit of Mailing

76-1380

To be argued by
ZACHARY W. CARTER

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

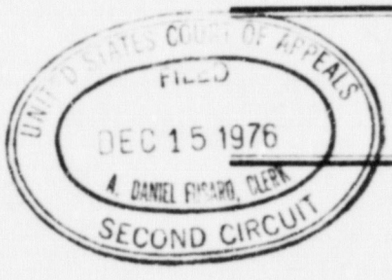
Docket No. 76-1380

UNITED STATES OF AMERICA,
Appellee,

—*against*—

JACK MIRENDA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
ZACHARY W. CARTER,
Assistant United States Attorneys,
Of Counsel.

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PRELIMINARY STATEMENT

Jack Mirenda appeals from a judgment entered on July 23, 1976, in the United States District Court for the Eastern District of New York (Platt, J.), convicting him, following a second jury trial, of a three count indictment which charged a conspiracy to possess and sell counterfeit United States currency in violation of Title 18, United States Code, Section 371 and the substantive offenses of possessing and selling counterfeit United States currency in violation of Title 18, United States Code, Section 472 and 473.[1/] Appellant was sentenced on July 23, 1976 to a term of imprisonment of 18 months on each count, to run concurrently. He is presently incarcerated.

Appellant was tried with co-defendant Robert Mirenda, who pleaded guilty to Count One before the conclusion of the trial.

On this appeal, appellant does not challenge the sufficiency of the evidence. Appellant's brief recites the facts of the case adduced at trial but raises no issues of law. Appellant did not move to suppress any evidence introduced

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1/ Appellant and co-defendant Robert Mirenda were first tried before the Honorable Orin Judd on March 15, 1976. A mistrial was declared on March 18, 1976 when the jury failed to reach a verdict on any of the counts charged against Jack Mirenda and on counts one and three respecting Robert Mirenda. The jury acquitted Robert Mirenda on Count two. Co-defendant Barton Jannuzzi pleaded guilty to all counts of the indictment before this first trial.

at trial. Appellant does not challenge any evidentiary rulings made by the Court during the course of the trial. Appellant did not take the stand at trial and offered no evidence. Appellant's brief concludes with the request that the judgment of conviction be reversed pursuant to Anders v. California, 386 U.S. 738 (1966).

STATEMENT OF FACTS

The principal witnesses for the Government was Special Agent Gerald Hochman of the Drug Enforcement Administration. In the early part of May 1975, Hochman, who was acting in an undercover capacity, learned from Barton Jannizzi that Januzzi had access to and could supply Hochman with counterfeit United States Federal Reserve Notes. In a series of phone conversations which occured between May 7 and May 12, 1975, and which were consensually recorded by Hochman, Januzzi and Hochman made definite arrangements for the sale of the counterfiet currency. During the course of these conversations, Jannuzzi mentioned that his source for the notes were a friend named "Bucky" and Bucky's "Uncle Jacky." The tapes of these conversations were played at the trial.

On May 12, 1975, Agent Hochman met Jannuzzi outside a bar in lower Manhattan for the purpose of purchasing the counterfeit currency. At that time, Jannuzzi introduced Agent Hochman to Robert Mirenda whom Agent Hochman understood to be Jannuzzi's friend "Bucky". Robert Mirenda entered Jannuzzi's car, a grey Grand Prix, and drove toward the end of the block where Special Agent Dennis Fabel observed him pick up a grey-haired male. Shortly afterward, Agent Hochman

and Jannuzzi got into Hochman's automobile and followed Robert Mirenda to Brooklyn, where he drove to Ditmas Avenue near Flatbush Avenue. Robert Mirenda turned into a dead-end Street and parked. Agent Hochman followed and parked a short distance away. A few moments later, Hochman observed appellant and a female approach his car from the direction of the car Robert Mirenda had been driving. Both appellant and the female got inside Agent Hochman's automobile and directed Hochman to drive to Flatbush Avenue. On arrival the female demanded that Hochman giver her the $1500 that was to be paid for the $5,000 in counterfeit currency he had agreed to purchase. Appellant assured Hochman that the money would be safe and Hochman surrendered the cash. The female then exited Hochmans car and a short time later appellant also left the car. Within a few moments, appellant returned and delivered to Hochman $5,000 in counterfiet United States currency. Hockman then drove Jannuzzi and appellant back to the dead-end street where he had first met appellant. Just after Hochman had discharged Jannuzzi and appellant, Special agent James Heavey observed appellant, Jannuzzi, and Robert Mirenda in the grey grand prix driving away from the dead-end street along Flatbush Avenue, heading back toward Manhattan.

ARGUMENT

APPELLANTS BRIEF PRESENTS NO ISSUES FOR REVIEW AND REVERSAL OF THE JUDGMENT OF CONVICTION IS NOT COMPELLED BY ANDERS V. CALIFORNIA 2/

Appellant's counsel, Hal Myerson, Esq., who was assigned to represent appellant on the trial of this case, moved for permission to withdraw as assigned counsel for appellant on this appeal by notice of motion filed August 3, 1976, citing in his affidavit, among other things, his inability "to objectively look at the trial record for errors." That motion was denied by this Court on August 16, 1976. Mr. Myerson, apparently still unable to discern any appealable issues of law, has submitted as appellant's brief a recitation of the facts adduced at trial. Appellant's brief concludes with a request that the judgment of conviction be reversed pursuant to Anders v. California, 386 U.S. 738 (1966).

The Government in preparing this brief, has of course reviewed the record below. We, too, find no arguable or demonstrable error of law that could be raised on appeal before this court. The case was a simple one. As stated

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2/ 386 U.S. 738 (1966)

it involved the direct sale of counterfeit currency to an undercover agent. The proof consisted entirely of testimony by agents, one of whom actually participated in the transaction, and the counterfeit money itself. No evidence was seized from the appellant's person nor were there any statements obtained from the defendant. The only issue raised at trial was the credibility of the Government agents and that issue, by the jury verdict, was resolved in favor of the Government. The evidentary rulings below, not challenged on this appeal, appear to be entirely correct. Inasmuch as this case, as tried below, presents no viable issues for appeal, we conclude, as appellant's counsel must have by the very nature of his brief, that there were no non-frivolous issues. Indeed, in this connection, Mr. Meyerson's efforts to initially withdraw from this appeal, taken together with the submission of a brief which as we have just mentioned, raises no issues of law or fact and which cites Anders v. California, compels this conclusion.

Anders, supra, held that if after a conscientious examination of the case assigned counsel finds that an appeal is wholly frivolous, after so advising the court, he may request permission to withdraw, but that request must be

accompained by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent in order that he may raise any points that he chooses. After reveiwing counsel's request and brief, the court, if it concludes that appeal is frivolous, may dismiss the appeal and permit counsel to withdraw. 386 U.S. at 744. While the Anders solution may not have been pursued in an orderly fashion by appellant's counsel, the circumstances suggest that he sought to obtain the same result. And counsel's reluctance to explicitly denominate the appeal of a defendant he represented at trial is frivolous is understandable. 3/

Clearly, Anders did not contemplate reversal of a conviction where an appeal appears to be frivolous, particularly where counsel was not allowed to withdraw. On the contrary, Anders provides a mechanism which enables the appellant court to review the record and determine independently whether an appeal is frivolous, and if it should

3/ Research into the question of frivolity, indicates that with the exception of Anders-type situations the cases primarily deal with appeals from denials of applications to reduce bail. E.g. These cases, we submit, are not in point. While the normal and better procedure would have been for appellant's counsel to advise this Court that his appeal was frivolous and to submit to the Court an appropriate brief we submit that in this case, he has in fact done just that, albeit by a circuitous route.

so find, to dismiss the appeal.

Accordingly appellants claim in this regard is wholly without merit.

CONCLUSION

The appeal should be dismissed as frivolous, or in the alternative, the judgment of conviction should be affirmed. 4/

Dated: December 15, 1976

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

BERNARD J. FRIED and
ZACHARY W. CARTER
Assistant U.S. Attorneys
(Of Counsel)

4/ In light of Mr. Meyerson's affidavit dated December 10, 1976 appellants brief was clearly intended to be an Anders brief, and accordingly, the appeal should be dismissed.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 15th day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Hal Meyerson, Esq.
80 Broad Street
New York, N.Y. 10004

Evelyn Cohen

Sworn to before me this
15th day of Dec. 1976

Carolyn M. Johnson

CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-[illegible]8208
Qualified in [illegible] County
Term Expires March 30, 19[illegible]77